BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARIA P. CERVANTES Claimant	)	
VS.	)	
SAFELITE GLASS CORPORATION Respondent	)	Docket No. 1,012,477
AND	)	
AMERICAN ZURICH INSURANCE CO. Insurance Carrier	)	

ORDER

Both parties requested review of the January 17, 2007 Award by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on April 25, 2007.

APPEARANCES

Russell B. Cranmer of Wichita, Kansas, appeared for the claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This matter proceeded to regular hearing on March 23, 2005, before Administrative Law Judge (ALJ) Nelsonna Potts Barnes. At that time, terminal dates were established, with claimant's terminal date being April 25, 2005, and respondent's terminal date being May 25, 2005. Evidence was presented and the matter submitted to the ALJ, with respondent's submission letter being filed on May 25, 2005, and claimant's submission letter being filed on June 27, 2005, with the Division of Workers Compensation. On November 30, 2005, an Award was issued by Special ALJ Vincent Bogart. The respondent filed an application for review before the Board on December 9, 2005. The Board issued

an Order on April 26, 2006, setting aside the Special ALJ's Award due to lack of jurisdiction in the matter and remanded it back to the ALJ for further determination.

Upon remand the ALJ Nelsonna Potts Barnes found the claimant sustained a 35 percent work disability based upon a 59 percent wage loss and an 11 percent task loss.

The respondent requests review of the following: (1) whether the claimant's accidental injury arose out of and in the course of employment; (2) date of accident; (3) whether the claimant sustained an intervening accident; (4) nature and extent including preexisting impairment and work disability; and, (5) whether the date of accident was changed in violation of respondent's due process rights.

Respondent argues their due process rights were violated when Judge Barnes manipulated the single date of accident to a series. Respondent further argues the claimant has failed to sustain her burden of proof that her accidental injury arose out of and in the course of employment and therefore all benefits should be denied.

Claimant argues that Dr. Murati's opinion regarding task loss is more persuasive and therefore she is entitled to a greater work disability than awarded by the ALJ.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as hereinafter noted.

Accidental injury arising out of and in the course of employment

The claimant's testimony that she injured her back lifting windshields at work for the respondent is uncontradicted. The respondent's associate service manager agreed respondent was aware of claimant's complaints regarding her back in March, April and June 2002. The respondent referred her for treatment initially with Dr. Daryl Thomas and then with Dr. Robert Eyster. Drs. Philip R. Mills and Pedro A. Murati concluded that claimant's back injury was causally related to her work. The ALJ analyzed the evidence in the following fashion:

> Claimant sustained multiple aggravating injuries throughout her working history at Safelite and specifically from and during the years 2002 and 2003. The record is replete with doctors' examinations and tests reflecting some type of

> permanent back injury arising from her work at Safelite. Although claimant reflects a good deal of confusion as to specific dates and events, it seems to the court that the evidence of a back injury from her work is preponderant if not overwhelming.

The Board agrees and affirms.

Was the date of accident changed in violation of respondent's due process rights?

Respondent argues that this case was filed as a single traumatic date of accident and the ALJ's Award resulted in a finding that claimant suffered a series of repetitive traumas to her back. Respondent argues that it defended the case based upon an allegation of a single traumatic injury.

The administrative file reflects that the initial E-1 application for hearing in this case was filed with the Division of Workers Compensation on August 28, 2003, and alleged a date of accident of April 26, 2002, and each working day thereafter. An amended application for hearing was filed on September 2, 2003, and alleged an accident date of April 26, 2002. But the letter to the Division of Workers Compensation from claimant's attorney that contained the amended application still noted the date of accident was April 26, 2002, and each working day thereafter.

As the litigation proceeded the claimant provided respondent with notice of intent letters that contained an accident date of April 26, 2002, and each working day thereafter. However, the E-3 application for preliminary hearing indicated an accident date of April 26, 2002.

At the regular hearing in this matter, there was a discussion that at the prehearing settlement conference the parties had agreed to a date of accident of June 9, 2002. The respondent withdrew that stipulation and denied accidental injury as well as the date alleged. The following colloquy then occurred:

> MR. CRANMER: I'm trying to figure out --we've had a preliminary hearing on this case before, Judge.
>
> THE COURT: Yes, we did.
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> MR. CRANMER: So I'm trying to figure out if I need to go through all the arose out of and during the course of employment questions again, I didn't know he was going to deny that, or if we had done it before.
>
> MR. TORLINE: Well, if you want, Russell, I could maybe help you out. My confusion stems from there are at least five different dates which have been alleged to be the date of accident, and I'm kind of, I guess, confused by it all.

> MR. CRANMER: Well, that's why I asked if you were denying she got hurt or just denying that was the date of accident. We agreed to June 9th or whatever that date was just as a date of accident so we'd have one to go by. She actually originally hurt herself in April of '02, and then continued to work and made it worse, so I can just have her testify to that, I guess.
>
> MR. TORLINE: I've got, you know, several different dates.
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> MR. CRANMER: That's fine.
>
> THE COURT: Your probably should, since it's an issue.[1]

There was no stipulation to a date of accident at the regular hearing but it is equally clear that claimant was alleging a series of accidents commencing in April 2002. Respondent was neither prejudiced nor denied due process where it was made clear at the regular hearing that the date of accident was disputed and claimant was alleging a series of injuries commencing in April 2002.

Date of accident

The claimant is a poor historian and over the extended course of the litigation of this case when she referred to an accident in April 2002 she mentioned dates including 4/22/02, 4/26/02 and 4/30/02. Claimant further mentioned injury, again lifting a windshield in June 2002. Nonetheless, it is clear from the record that after she injured her back in April 2002 she continued performing the same job for respondent with ongoing aggravation to her back. After the April 2002 incident lifting the windshield the claimant's back pain continued to worsen as she continued to perform the same job. She testified that the June 2002 incident was just her back condition getting worse. She testified:

> Q. But when you got hurt, you notified your employer?
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> A. I always do, all the time.
>
> Q. And they eventually sent you to Dr. Thomas who treated you for this?
>
> A. Yes.
>
> Q. Okay. And according to the records, the pain didn't resolve and it continued to get worse, is that correct?
>
> A. After I got that epidural, it got worser [sic].

[1] R.H. Trans. at 9-10.

> Q. And you were injured again on June 9th of 2002, but was that a new injury or just an aggravation of the continuing injury that you had?
>
> A. It was just continuing, getting worser [sic] and worser [sic].[2]

The claimant had an onset of back pain in April 2002 that continued to worsen as a result of repetitive trauma from her continued job lifting windshields. Finally, on August 10, 2003, the respondent re-assigned claimant to a different job because of the lifting restrictions imposed by the authorized physician.

A claimant's last injurious exposure to repetitive or cumulative trauma is when he or she leaves work. But when the claimant does not leave work or leaves work for a reason other than the injury, then the last injurious exposure is when the claimant's restrictions are implemented and/or the job changes or job accommodations are made by the employer to prevent further injury.

> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[3]

The ALJ determined claimant's date of accident for her repetitive injuries was August 10, 2003. The Board agrees and affirms.

Whether the claimant sustained an intervening accident?

After claimant was terminated from her employment with respondent she obtained a job as a cashier for Food-4-Less. But she noted that her back was still painful when her employment with respondent was terminated. And as she worked for Food 4 Less her pain did not go away so she limited her hours worked to approximately 25 to 31 hours a week instead of 40 hours. In *Logsdon*[4] the Kansas Court of Appeals noted that in the determination whether an injured worker's condition is a natural consequence of the primary injury or a new and distinct injury a distinguishing fact is whether the prior underlying injury had fully healed. If not, subsequent aggravation of the injury even when caused by an unrelated accident or trauma may still be a natural consequence of the original injury. Consequently, claimant's testimony establishes that after she injured her back working for respondent her back continued to bother her and she continued to receive treatment on an as needed basis from Dr. Eyster both before and after her subsequent

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[2] *Id*. at 58-59.

[3] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, Syl. ¶ 4, 987 P.2d 325 (1999).

[4] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

employment with Food 4 Less. More significantly, claimant noted that she reduced her hours worked for Food 4 Less so that her back pain would not increase. Respondent has not met its burden of proof to establish claimant suffered an intervening accident at her employment with Food 4 Less.

Nature and extent of disability

Respondent argues that claimant should be limited to her functional impairment because she would still be making a wage equal to her pre-injury wage but for her termination for violation of respondent's attendance policy.

Respondent has an attendance policy that assesses points against an employee for failure to call in before a shift commences or for absences from work. Accumulation of six points subjects an employee to termination. In April 2003 claimant had been counseled regarding her attendance because she had accumulated 4.5 points. But points are not assessed for absences related to a worker's compensation injury.

The Kansas Appellate Courts, beginning with *Foulk*[5], have barred a claimant from receiving work disability benefits if the claimant is offered an accommodated job paying 90 percent or more of her pre-injury wage and is capable of performing the job within her medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decisions is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so.[6] Before claimant can claim entitlement to work disability benefits, she must first establish that she made a good faith effort to obtain or retain appropriate employment.[7]

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis. The test of whether a termination disqualifies an injured worker from

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[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

entitlement to a work disability is a good faith test on the part of both claimant and respondent.[8]

On August 27, 2003, claimant arrived at work but because her back was hurting she did not go into work and instead went to the emergency room for treatment. From the emergency room she called her supervisor and told him she would not be in to work. The following workday she took the note from the emergency room physician to respondent but she was terminated. Clearly, this absence was related to her ongoing back pain from her work-related injury and she testified that she had attempted to explain that she was at the emergency room and unable to report to work when she contacted her supervisor by phone. Such circumstance does not indicate a lack of good faith that would prevent an award of work disability. The Board affirms the ALJ's determination that claimant is not limited to her functional impairment but instead is entitled to a work disability analysis.

Because claimant has sustained an injury that is not listed in the "scheduled injury" statute, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[9] and *Copeland*.[10] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted

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[8] See *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App.2d 278, 28 P.3d 398 (2001) and *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). But see *Graham v. Dokter Trucking Group*, ___ Kan. ___, 161 P.3d 695 (2007), in which the Kansas Supreme Court held, in construing K.S.A. 44-510e, the language regarding the wage loss prong of the permanent disability formula was plain and unambiguous and, therefore, should be applied according to its express language and that the Court will neither speculate on legislative intent nor add something not there.

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual post-injury wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[11]

After claimant was terminated from her employment with respondent, within approximately two months, she obtained work with Food 4 Less. Claimant testified that she was paid $8.25 an hour and worked from 25 to 31 hours per week. Consequently, the Board finds claimant's actual post-injury wage is $231 per week. ($8.25 x 28 = $231) This results in a 58 percent wage loss when compared with claimant's pre-injury wage of $550.32. The ALJ's Award is modified to reflect claimant suffered a 58 percent wage loss.

Dr. Murati reviewed the list of claimant's former work tasks prepared by Jerry Hardin and affirmed by claimant as an accurate compilation of her tasks in her 15-year work history before her accident with respondent. Dr. Murati concluded claimant could no longer perform 12 of the 28 non-duplicative tasks for a 43 percent task loss. Dr. Mills reviewed the list of claimant's former work tasks prepared by Jerry Hardin and affirmed by claimant as an accurate compilation of her tasks in her 15-year work history before her accident with respondent. Dr. Mills concluded claimant could no longer perform 3 of the 28 non-duplicative tasks for an 11 percent task loss.

The Board is mindful that upon cross examination the claimant agreed that she failed to mention jobs at three employers when compiling her task list with Mr. Hardin. The ALJ noted that the cleaning jobs at those three employers only lasted from a few hours to a couple of days and failure to mention those employments which only lasted a minimal amount of time did not render the task list unacceptable. The Board agrees. But, as noted by respondent, the task list contained four additional jobs that also only lasted two days or less. Accordingly, those four jobs and corresponding tasks[12] will be removed from the task list in order to calculate claimant's task loss because the jobs did not constitute substantial gainful employment. This results in a list of 19 non-duplicative tasks.

Dr. Murati opined claimant could not perform 8 of the 19 tasks for a 42 percent task loss. Dr. Mills opined claimant could no longer perform 3 of the 19 tasks for a 16 percent task loss. The Board will accord equal weight to each doctor's opinion and finds claimant

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[11] *Id.* at 320.

[12] R.H. Trans., Cl. Ex. 1, Attachments E, F, G and O.

suffered a 29 percent task loss. Averaging the 58 percent wage loss with the 29 percent task loss results in a 43.5 percent work disability. The ALJ's Award is modified to reflect claimant suffered a 43.5 percent work disability.

The record does not contain a filed fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated January 17, 2007, is modified to reflect claimant suffered a 43.5 percent work disability and affirmed in all other respects.

The claimant is entitled to 1.07 weeks of temporary total disability compensation at the rate of $366.90 per week or $392.58 followed by 180.53 weeks of permanent partial disability compensation at the rate of $366.90 per week or $66,236.46 for a 43.50 percent work disability, making a total award of $66,629.04 which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of October 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Russell B. Cranmer, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge